[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 240

JOSEPH COVELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING FROM THE DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks a rehearing of the order of October 20, 1969, denying his petition for a writ of certiorari. The primary question which he now presents is whether Section 605 of the Federal Communication Act of 1934 (47 U.S.C. 605), rendered inadmissible telephone company records of long distance calls made by a government witness where the telephone company, in the absence of a subpoena, had previously furnished copies of these records to an F.B.I. agent.

As petitioner candidly states, this question was not presented in his original petition; nor was it reasonably comprehended among the issues which were presented there. In a substantial sense, then, the question

373-701—69

is presented out of time.[1] While we do not contend that this consideration necessarily deprives the Court of jurisdiction, cf. *White* v. *Texas,* 309 U.S. 631; 310 U.S. 530; Stern & Gressman, *Supreme Court Practice* (4 ed.) 526, it does suggest that the reasons for action must be pressing. As in the case of an effort to argue on the merits questions not raised in a petition, *Irvine* v. *California,* 347 U.S. 128, 129, or a motion to amend the questions presented in a petition after the time for filing has passed, *Costello* v. *United States,* 365 U.S. 265, 284, the Court should grant review in such circumstances only for the most compelling reasons. Stern & Gressman, *supra,* 298–299, 301. In this case, the question now sought to be presented would not warrant plenary review even if it had been timely presented.

1. The record here shows that on May 2, 1963, the New York Telephone Company received an anonymous letter (A. 542) that Merrill Garfinkel was using fictitious credit cards to make long distance telephone calls. The letter was referred to the F.B.I. and, on the following day, the telephone company showed F.B.I. agent Paul Newman its billing statements or toll slips for long distance calls charged to TR 9–3755, the home number of Merrill Garfinkel (A. 75–76, 88, 277–279). As a result of a surveillance of Garfinkel, the F.B.I. found him in a telephone booth using a false credit card to telephone HU 4–9011, one of the

[1] This Court's Rule governing petitions for rehearing on petitions for writs of certiorari refers to "*grounds* * * * confined to intervening circumstances," (Rule 58(2); emphasis added), but does not suggest that new *questions* may be presented as a result of intervening circumstances.

numbers used by petitioner and his associates in their wagering business (A. 76, 167, 185). At petitioner's trial for interstate wagering activities, Merrill Garfinkel testified as a government witness that on a daily basis from the summer of 1961 until June 1963, he wagered by telephone with petitioner and his associates, and telephoned the "line" to them (see, *e.g.*, A. 141–142, 145). Garfinkel said that he usually telephoned from public telephone booths but that he sometimes called from his home telephone, TR 9–3755 (see, *e.g.*, A. 141–142, 145). The government introduced into evidence the billing statements on Garfinkel's telephone containing a record of the long distance calls that he made including the date the call was made and the number and place called (A. 270–271, 500–527).

The government also introduced into evidence toll slips charged to PL 9–2829 and to HU 4–4190 which had been previously furnished to the F.B.I. pursuant to three letter requests, two pertaining to the former number and one to the latter. Petitioner and co-defendant Molinaro were separately listed as the subscriber to the latter number while one Charles Muselli was listed as the subscriber to the former number. Petitioner's objection to the introduction of these slips on the ground that the examination of the slips without a subpoena violated Section 605 of the Federal Communication Act was denied (A. 382–389, 401–403).[2]

[2] Prior to trial, petitioner moved for discovery of all toll slips of the telephone calls which were the subject of the various counts of the indictment on the ground that such items "may furnish evidence admissible on behalf of this defendant" (A. 25–27). The government furnished petitioner this information in its bill of particulars (A. 38–39).

On appeal, petitioner limited his objection to the Garfinkel toll slips.

2. The first clause of Section 605 of the Communications Act, as it then read,[3] provided that no person receiving or transmitting any interstate communication "shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof" other than, as relevant here, to "the addressee, his agent, or attorney, * * *, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed * * * in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority * * *." This clause must be read in light of its purpose, which was to protect the integrity of the communications system. *Bennanti* v. *United States,* 355 U.S. 96, 100. It "must be interpreted in the light of reason and common understanding to reach the results intended by the legislature" *Rathbun* v. *United States,* 355 U.S. 107, 109.

So considered, it is evident that the statute would not preclude the telephone company from furnishing toll records made in the ordinary course of its business to an investigating agency of the government which is attempting, at the request of the telephone company, to ascertain whether an individual (in this case Garfinkel) was defrauding the telephone company by means of fraudulent credit cards. The telephone company needed

[3] Whether Congress inadvertently or otherwise amended Section 605 in 1968 to forbid disclosures in response to subpoena or demand of other lawful authority (Reh. Pet. 8–10) is not an issue as to this 1967 conviction.

neither a subpoena nor a "demand of other lawful authority" to take such measures to protect its revenues.

Since this was the only circumstance made an issue before it, the court below properly found it unnecessary to consider whether a request by the F.B.I. to examine toll slips for an investigation not intended to assist the telephone company was covered by the first clause of Section 605 and was a "demand of other lawful authority." The decision of the Second Circuit thus is not in conflict with the decision of the Sixth Circuit in *DiPiazza* and *Deming* v. *United States*, 415 F. 2d 99, now pending on petitions for writs of certiorari on Nos. 960, 965, O.T. 1969. Significantly, what is implicit in Section 605—that the telephone company may take reasonable measures to protect its revenues—has now been made explicit by a provision of the Omnibus Crime Control and Safe Streets Act of 1968 which specifically provides that it is not unlawful for a communication carrier to intercept, disclose or use a communication which is necessary "to the protection of the rights or property" of the communication carrier. 18 U.S.C. 2511.

Beyond this, the exclusions from the prohibition against disclosures contained in the first clause of section 605 are not limited to "a subpena or other process," as petitioner contends. The statute authorizes disclosure, not only under subpoena, but on "demand of other lawful authority". The ordinary meaning of the latter phrase includes a request from a law enforcement agency, such as the F.B.I., authorized by Congress to engage in a criminal investigation. This interpretation places telephone messages on a par with

first class mail, for information appearing on the face of letters may be furnished to prosecuting officials without a subpoena. See *Schwartz* v. *United States,* 283 F. 2d 107 (C.A. 3), certiorari denied, 364 U.S. 942. The comprehensive plan for the regulation of interstate communication established by the Communication Act (see *Benanti* v. *United States,* 355 U.S. 96, 104) presupposes inspection of records by government agents, that is by "other lawful authority." Congress was not concerned with such disclosures but with disclosures by a communication employee "for his own benefit or for the benefit or another not entitled thereto" and with disclosures from unauthorized interceptions. See Clauses 2 and 3 of Section 605.

Significantly, the statutory restriction against disclosure in the first clause of Section 605 is limited to the employees of a carrier engaged in the receiving and transmitting of communications. It does not embrace the "accounting or distributing officers of the various communicating centers over which the communication may be passed * * *." This supports the conclusion that these accounting officers may disclose their accounting or toll records even when such records disclose the existence of a communication. Otherwise, Congress would not have limited its restriction to those persons engaged in telecommunications but would have included all employees of communication carriers. Toll slips, after all, are not the types of record which are inherently intended to be private. They should not be deemed privileged in the absence of a clear Congressional intent against disclosure. The subscriber of a telephone, like a guest at a hotel, is fully aware that

business records are being kept of the fact that he has made a call. This was noted as long ago as 1941, when Section 605 was construed not to preclude the introduction of telephone records at a trial. *United States* v. *Gallo*, 123 F. 2d 229, 231 (C.A. 2).

Finally, except for the time he was the actual subscriber, petitioner has no standing to object to the toll slips prepared for the purpose of having accounting records of long distance calls charged to another telephone company subscriber.[4] Such toll slips do not record any part of the receiver's message but merely the fact that the subscriber, or someone using his telephone, made a call to a particular number. In particular, as to the Garfinkel calls, petitioner had no standing to challenge the evidence since the subscriber, Garfinkel, testified at the trial that he made the particular calls recorded in the toll slips.[5]

For the foregoing reasons, it is respectfully submitted that the petition for rehearing should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1970.

---

[4] As noted above, in the court of appeals petitioner challenged only the toll slips as to Garfinkel calls.

[5] The fact that the telephone company had previously furnished copies to the F.B.I. does not affect the admissibility of these records at trial. "[I]t was a near certainty that the * * * [toll slips] would have been acquired by subpoena even had the original disclosures never occurred." *United States* v. *Pardo-Bolland*, 348 F. 2d 316, 321 (C.A. 2), certiorari denied, 382 U.S. 944. In any event, Garfinkel had the right to waive any invasion of his rights as a subscriber.

U.S. GOVERNMENT PRINTING OFFICE 1970